APPENDIX A

Judgment of the United States Court of Appeals for the Tenth Circuit:

JUDGMENT

Fourth Day, November Term, Thursday, November 19th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips, and Honorable David T. Lewis, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and were argued by counsel.

On consideration whereof, it is now here ordered by the court that the judgment of the said district court in these causes be and the same is hereby affirmed. Each party shall bear its own costs.

APPENDIX B

(Filed November 19, 1964)

Opinion

UNITED STATES COURT OF APPEALS TENTH CIRCUIT
NOVEMBER TERM, 1964

Nos. 7651 and 7652

BROTHERHOOD OF RAILROAD TRAINMEN, G. W. BLACK AND R. E. GARDNER, *Appellants and Cross-Appellees,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Appellee and Cross-Appellant.*

Appeal from the United States District Court for the District of Colorado

James L. Highsaw, Jr., Washington, D. C., (Philip Hornbein, Jr., Denver, Colorado, and Hornbein & Hornbein, Denver, Colorado, and Mulholland, Hickey & Lyman, Washington, D. C., Of Counsel, on the brief) for Appellants and Cross-Appellees.

Walter J. Cummings, Jr., Chicago, Illinois, (T. A. White and Kenneth D. Barrows, Denver, Colorado, and Ray Garrett, Chicago, Illinois, and Sidley, Austin, Burgess & Smith, Chicago, Illinois, Of Counsel, on the brief) for Appellee and Cross-Appellant.

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

This is an action brought under Section 3 First (p) of the Railway Labor Act, U.S.C. § 125 First (p), to enforce an order of the National Railroad Adjustment Board, First Division. The Board order determined that the appellee railroad had violated its collective bargaining agreement

with the appellant Brotherhood and granted an award to the individual appellants, as employees of the railroad and members of the craft represented by the Brotherhood, of one day's full pay for each claim filed. The cause was submitted to the District Court upon stipulated facts. That court held that the Board had correctly determined that the railroad had breached its bargaining agreement but had incorrectly determined the amount of the allowable award. Judgment in the District Court was entered in favor of the individual claimants for nominal damages of one dollar per day for each claim. By cross appeals the parties assert error in the portion of the judgment that is adverse to their respective interests.

The undisputed pertinent facts may be summarized. Prior to March 6, 1952, the railroad operated a forty-five mile straight-away run between terminals located at Provo and Eureka, Utah. On March 6 the railroad notified the Brotherhood that the run would be changed from a straight-away to a daily turnaround run operating over the same line. As a result, the crew would return each evening to the home terminal, Provo, rather than every other evening. The change required the same number of crew members, called for the same rate of pay, and maintained the same length of assignment, six days per week. The Brotherhood protested the unilateral action of the railroad in effectuating the change, asserting it to be subject to negotiation under the provisions of Article 64 of the collective bargaining agreement; the railroad contended that such interpretation of Article 64 was incorrect. Article 64 provides:

"Establishing New Runs

"The Company is not prohibited by any Article or provision of this Agreement from establishing new runs, or new assignments. Notices calling for bids on any new run or new assignment must state definite

limits and must show number of days per week (6 or 7) to be worked and time crew will go on duty.

"Rates of pay for any new run or new assignment will be in accordance with rates for similar assignments on the same Sub-Division. If no similar assignment on the same Sub-Division, rate of pay will be a matter of negotiation between the designated General Officer and General Chairman of the Brotherhood of Railroad Trainmen.

"Note: Time for crews to go on duty will not be changed without at least 48 hours' notice. When time to go on duty is changed one (1) hour or more the assignment will be rebulletined."

In interpreting Article 64 both the Board and the District Court concluded that the railroad had violated its terms. We hold that such determination is within the bounds of reasonableness and consequently not in error. Article 64 became part of the collective bargaining agreement in 1945, prior to which the agreement had specifically required the railroad to negotiate new runs. By Board decision and by practice this earlier provision had been interpreted and applied as highly restrictive upon the right of the railroad to change tabulated assignments or working conditions without negotiation. In bargaining for the 1945 contract the railroad proposed a revision of the provisions of Article 64, the pertinent part of such proposal reading:

"Establishing New Runs—Freight or Mixed Service

"The Company is not prohibited by any article or provision of this Agreement from establishing new runs, or new assignments, or from discontinuing or re-arranging old assignments. Notices calling for bids on any new run, new assignment or re-arrangement of an old assignment must state definite limits and must show number of days per week (6 or 7) to be worked.

"Rates of pay for any new run, new assignment or change in old assignment will be in accordance with

> similar rates for similar assignments on the same subdivision. If no similar assignment on the same subdivision, rates of pay will be through freight rates (plus conversion rates if local work as defined in Conversion Rule (5-D) is performed."

The proposal of the railroad was accepted by the Brotherhood only in part, and all reference to the re-arrangement of assignments was deleted. And while the apparent significance of proposal and counterproposal of parties engaged in the continuing and repetitive technique of collective bargaining may not always be reliable as a complete reflection of the parties' intent, we are satisfied in the case at bar that the history of Article 64 is ample support for the court's conclusion as to the article's proper interpretation. Certain it is that the railroad's contention that its change from a straight-away to a turn-around run established a new run or assignment, specifically authorized by Article 64, is both strained and unpersuasive.

Subsection First (p) of 45 U.S.C. § 153 provides that the suit in the District Court "shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . . ." Although the Board order awards to the individual appellants a full day's pay for each claim filed, both the findings and the order of the Board make no mention of the basis for the amount of the award. And since the parties have stipulated that the aggrieved employees have suffered no actual monetary loss or hardship from the contract violation, both the weight of the Board order as evidence of fact and the presumptive correctness of the Board order, Elgin, Joliet & Eastern Ry. v. Burley, 327 U.S. 661, are completely dissipated. The District Court, then proceeding as in "other civil suits," limited the award to nominal damages and refused enforcement of the Board order to a greater extent.

The collective bargaining agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act. See Priebe & Sons v. United States, 332 U.S. 407, 413. And if, as counsel for the Brotherhood contends,[1] there exists within the industry a long established and accepted custom to pay what would amount to a windfall for contract violations such as here occurred, such custom was not established by finding, nor requested as a finding, in the procedures before either the Board or the District Court. We conclude that the District Court correctly determined that the instant case is governed by the general law of damages relating to contracts; that one injured by breach or an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Atlantic Coast Line R.R. v. Brotherhood of Ry. Clerks, 4 Cir., 210 F. 2d 812, 815; United Protective Workers v. Ford Motor Co., 7 Cir., 223 F. 2d 49, 53-54. Absent actual loss, recover is properly limited to nominal damages. Oklahoma Natural Gas. Corp. v. Municipal Gas Co., 10 Cir., 113 F. 2d 308; Norwood Lumber Corp. v. McKean, 3 Cir., 153 F 2d 753; 5 Williston, Contracts (rev. ed.) § 1339A.

The judgment is affirmed. Each party shall bear its own costs.

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[1] Counsel states that a review of awards of the National Railroad Adjustment Board as of September 18, 1963, indicates that "there are more than 1,000 cases involving railroads throughout the United States, in which a carrier has been required to pay a basic day's pay for a violation of a contract provision although the contract did not contain any provision for punitive damages or penalties. At least 110 of these awards involved the D&RGW." We have not, of course, made such a review. However, we find no statement in any of the awards to which we have been specifically referred that indicates the alleged custom to have been established as a fact. And, indeed, several of the awards hold that actual loss is a prerequisite to an award.

APPENDIX C

Section 3, First (i) through (q) of the Railway Labor Act (45 U.S.C.A., Sections 153, First (i) through (q))

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division member, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select

a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such orderer, the petitioner, or any person for whose benefit such order was made, may file in the District Court of

the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board and not after.